Challenges to Intellectual Freedom:
Implications for the Twenty-First Century

by Judith F. Krug

Editor's note: *Judith F. Krug, director of the American Library Association's Office of Intellectual Freedom, presented this address at a luncheon sponsored by NCLA's Intellectual Freedom Committee, the Reference and Adult Services Section, and the NCLA Conference.*

On December 15, the first ten amendments to the United States Constitution — the Bill of Rights — will celebrate their two hundredth birthday. There's something to be said for having survived two hundred years — I just wish the "something" were a little more positive! For in truth, the Bill of Rights — particularly the First Amendment — is not in very good shape. Challenges are being laid down on a rapid fire basis, resulting in a continuing whittling away of our most basic freedoms. I'm not a seer, but given the current state of the First Amendment, it probably doesn't take a seer to anticipate that things will probably get worse — and possibly a lot worse — before they get any better.

Before going further, however, I want to identify exactly what we're talking about. In librarians' jargon, intellectual freedom means the right of every person to hold any belief on any subject, and the right of a person to express her beliefs or ideas in whatever way she considers appropriate. The ability to express an idea or a belief, however, is not very meaningful without an audience on the other end to hear, read, or view that expression. Intellectual freedom, then, is the right to express your ideas and the right of others to be able to hear them.

The next question, of course, is — why are librarians concerned about intellectual freedom? The answer is simple — librarians' basic role is to make ideas and information, in whatever form they appear, available and accessible to anyone who needs them or wants them. That's our role — but is it really important? In my opinion, it's vital. We live in a constitutional republic — a government of the people, by the people, and for the people. But this form of government does not function effectively unless its electorate is enlightened. The electorate must have information available and accessible. And it does — in our nation's libraries.

Our concept of intellectual freedom finds its roots in the First Amendment to the U.S. Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

That's it — forty-five little words. In my opinion, they go a long way toward making the United States of America unique among the nations of the world. Of course, you may know that when the Bill of Rights was sent to the states for ratification, there were actually twelve amendments. What is now known as the First Amendment was originally amendment number three. The original First Amendment dealt with how to determine the number of Representatives in the House, and the second dealt with the compensation of Congresspeople. The people, however, in their early — and allegedly continuing — wisdom, declined to ratify the proposed first two amendments. Number three, therefore, became one — and the center of the constitutional constellation was established.

The *uniqueness* of the First Amendment lies not only in its guarantees, but also in its lack of proscriptions. For instance, the First Amendment guarantees freedom of speech — and does not mandate that the speech be truthful, honest, equal, sensitive, tasteful, showing good judgment, respectful, or anything else. If you want to lie through your teeth, the First Amendment gives you the right to do so. Of course, you also have to live with the consequences of your speech — but that is another issue, and it is part of what makes the First Amendment so fascinating.

The *importance* of the First Amendment is that it is the mechanism which allows us to be a nation of self-governors — a government of the people, by the people, and for the people. It provides for our access to ideas and information across the spectrum of social and political thought — and also gives us the right to respond to those ideas and that information in whatever way we deem appropriate.

It is within this context, then, that I want to look at the challenges to the First Amendment that are now facing us and will continue to face us through this decade to the year 2000 — and perhaps beyond.

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The first area of challenge is "sponsorship." "Sponsorship" goes to the question of what cultural or intellectual activities the public will fund — and who decides? The issue, of course, is not new. It became very visible — in other words, front page news! — as a result of two traveling exhibitions of photographs — Robert Mapplethorpe's homoerotic photos, and the so-called "Piss-Christ" of Andres Serrano — or, as Senator Jesse Helms

referred to them on the floor of the Senate, Mapplethorpe's "filth" and Serrano's "blasphemy." Such filth and blasphemy became the focus of public scrutiny because the National Endowment for the Arts helped with the funding of both exhibitions. The Mapplethorpe exhibit, of course, led to a trial in Cincinnati, and together, the exhibitions caused the National Endowment for the Arts to be subjected to two rounds of Congressional scrutiny. The end result was some restrictive language that turns out to be rather benign. A year ago, however, the amendment that Helms initially proposed was anything but benign. It would have prohibited use of NEA funds "to promote, disseminate, or produce obscene or indecent materials . . . material which denigrates the objects or beliefs of the adherents of a particular religion or non-religion, or material which denigrates, debases or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age or national origin."

First Amendment devotees had a real fight on their hands. And every time someone said to Jesse Helms, "You're violating the First Amendment, you're allowing for censorship," Helms would say, "What are you talking about? The First Amendment does not apply to a restriction that is imposed on a grant to an artist. The First Amendment is about keeping the police from knocking on dissidents' doors in the middle of the night. The First Amendment is about censorship. My bill," said Helms, "is about sponsorship. Sponsorship, not censorship." In the recently completed debate on the NEA, Helms reiterated this theme.

> "Censorship has not now nor has it ever been the issue," he said. "Sponsorship is the issue . . . Why are taxpayers constitutionally obliged to finance a decadent artistic elite? . . . If some guy wants to scrawl dirty words on a men's room wall, let him, as long as he supplies the crayon and the wall."

That's a powerful argument. It says, and not too subtly, that "those who pay the piper, call the tune." In other words, when the government acts as patron, rather than policeman, the taxpayers who pay the tab may exercise a kind of aesthetic veto, may express their preferences, their whims, their ideologies, their tastes — just as a private patron might. Private art patrons, as we all know, can be a lot of things — including sensitive, intelligent, whimsical, empirical, and so on. I am reminded, in fact, of the little scene from *Amadeus*, where the Emperor told Mozart that his opera had, well, too many notes. The bottom line of Helms' argument was and is that the government can ignore artists who don't write, or dance, or play, or paint to the government's tune; that if the government is to sponsor art, it can tell the artists what to write, what to paint, how to dance, or what to play. In the end, it seems to me that the *government* is trying to use the power of the purse to buy orthodoxy. To my way of thinking, this is violative of the First Amendment.

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The problem is that while it might seem that way to me, it apparently does not seem that way to the United States Supreme Court. On May 23, the High Court handed down the decision in *Rust v. Sullivan*, which upheld Department of Health and Human Services regulations prohibiting recipients of Title X family planning funds from providing any type of abortion counseling. For the first time, the Supreme Court sanctioned, in the words of Justice Blackmun's dissent in Rust, "viewpoint-based suppression of speech solely because it is imposed upon those dependent upon the Government for economic support." Justice Blackmun went on to say that the decision is "an intrusive, ideologically based regulation of speech . . . ."

The *Rust* decision could well have an effect on libraries, the one place in our society where information concerning all points of view on all issues facing us is freely available and accessible to anyone who needs it or wants it. Libraries, of course, do not counsel; nor do libraries express opinions. They do, however, without favoritism, make available books, magazines and other materials that do counsel, that do express opinions, often in very strong terms. Thus, a library would not advocate or counsel abortion. But if asked by a pregnant woman wanting information about abortion about the options available to her, or about places where she might obtain an abortion, a library would provide her the materials she seeks. Such materials might well 'counsel' or advocate abortion; they might also counsel against or discourage abortion. The fact is, if doctors and other health care professionals can be constitutionally prohibited from providing abortion counseling, abortion referrals, and all information about abortion in subsidized (read "sponsored") family planning clinics — then government may also prohibit libraries and other institutions dependent upon public funding from making that same information available in material maintained on library shelves.

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This concern is not far-fetched. In fact, while the majority decision in *Rust* specifically exempted universities from ideologically based restrictions attached to federal funding, this was the *only* concession to the fundamental First Amendment concerns raised by the case. Furthermore, at least one trial balloon has been raised in a private conversation by Office of Management and Budget personnel to the effect that OMB may consider advising federal agencies that the rule in Rust could apply broadly, if not universally, to federally funded programs, so as to permit viewpoint discrimination in the administration of those programs.

As a matter of fact, there is a case pending before the U. S. Court of Appeals for the Ninth Circuit, called *Bullfrog Films v. Wick*. This case challenges regulations issued by the U. S. Information Agency governing the certification of films as educational for export purposes. The United States Government has sent a supplemental letter to the 9th Circuit contending that the Rust decision permits the government to attach ideological strings to the granting of a certificate attesting to the educational value of films.

Another gravely disturbing feature of the *Rust* decision is the Supreme Court's seemingly cavalier attitude toward the First Amendment rights of poor people to receive information. Justice Rehnquist's majority opinion states that indigent Title X clients "are in no worse position than if Congress had never enacted Title X. 'The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortion, but rather of her indigency.'"

Recently, there have been rumors — and I stress that they are

just that — unverified rumors — of librarians being pressured, because of the Rust decision, to remove from library shelves, all materials that mention abortion. If this should ever come to pass, it would only be a matter of time before libraries are pressured to remove and, of course, not to acquire, material containing that day's unspeakable idea. The crack in the dike would rapidly widen to allow the torrent of hates to sweep away ideas and points of view with which the most powerful or the most vocal disagree.

Taken to its logical extreme, the rule announced in *Rust* — that the government may attach viewpoint-based, discriminatory, ideological restrictions to public funding — would mean libraries could keep on their shelves or acquire, only books and other library materials which express a governmentally approved point of view. Another alternative — separate funding — would be an administrative nightmare. Those who could not afford to buy books and other information would not have access to the broad spectrum of thought and ideas. Their participation in the constitutional republic would be limited. Freedom could be enjoyed only by those who could afford to purchase it. But our Constitution rejects the notions that the people's elected representatives may tell them what they may or may not think, and that they are not allowed to disagree with the government's point of view. The elected and appointed officials of the United States government serve the people of the United States. The Ninth and Tenth Amendments, in fact, say that the powers not specifically delegated in the Constitution are reserved to the states — and, more importantly, to the people. Neither the Bill of Rights — nor the Constitution — say anything about such powers being reserved for Congress — either in its aggregate or individually — or for the Government, per se.

The decision in *Rust* has brought to the fore several other issues that well could become the First Amendment challenges of the future, whether near or long term. One of those issues concerns "politically correct" or "hate" speech, and whether or not it can be restricted in order to protect the sensibilities of the persons who might be offended. The original language in the Helms' Amendment went to this point and, if it had passed, would have established a federal legislative basis for the rules and regulations being promulgated on a multitude of college campuses which would protect the sensibilities — or the so-called educational rights — of students. It seems to me that whether authors, publishers, editors, artists, or mere speech makers should practice the art of self-censorship in the name of sensitivity to cultural, ethnic, racial, women's or other issues will become an increasingly prevalent focus of debate, as well as an increasingly volatile subject of debate.

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In libraries, at this point, the debate has not centered around politically correct or hate speech, but rather around the "insensitivity" of certain materials in our collections. For instance, after the Ayatollah Khomeini placed a death threat on Salman Rushdie, Rushdie's *The Satanic Verses* was challenged in libraries because it's insensitive to the Islamic religion. As far as I am aware, none of those complaints led to the removal or restriction of the novel.

There was somewhat more controversy over the attempts to remove the video of *The Last Temptation of Christ*. Indeed, in many parts of the country, there were organized efforts to remove this video from the public domain. The reason was its offensiveness, not only to fundamentalists, but to all Christians.

Perhaps the most notable work around which the "insensitivity" battle has swirled is Mark Twain's *Huckleberry Finn*. This book has been challenged and even banned in numerous schools and libraries throughout the country. The main characters, of course, are Huckleberry Finn and Nigger Jim. Never mind that the book was written as a racist plea; never mind that Nigger Jim, himself, displayed compassion, concern, creativity, and perhaps the only brains of any of the characters; never mind that it is a true American classic. The book does use what is considered today to be a vile epithet, and uses it as the name of one of the main characters. Because of this, the book has been charged with being "insensitive" to a large and important community of citizens; hence, the removal demands.

But if we remove *Huckleberry Finn*, should we not also remove Roald Dahl's *James and the Giant Peach* which is viewed as "insensitive" to Mexicans. There apparently is a line in the story when a peach says it would "rather be blind than be eaten by a Mexican."

To carry the insensitivity issue to its absurd extreme, we have also had demands to remove *The Lorax* by Dr. Seuss from the second grade core curriculum in Laytonville, California. You see, *The Lorax*, is a pro-environmental book — and Laytonville is a logging community — the charge being that the former is "insensitive" to the latter!

At this point, I would like to briefly discuss the Morristown case. The bare facts of the case are that Richard Kreimer, a homeless person, was removed from the Morristown (New Jersey) Public Library because of behavior that the librarians deemed

inappropriate for a public library, and because his body odor allegedly was making it impossible for other library patrons to use the facility. Subsequently, Kreimer filed suit against the library; in response, the library asked for a summary judgment on the facial validity of the policy under which Kreimer had been removed from the library. Personally, I believe this was an ill-chosen legal maneuver. A request for summary judgment about the rules only precluded the library from bringing to the court's attention the behavior engaged in by Kreimer which led to his removal. Summary judgment is a procedural maneuver which assumes that there is no factual dispute (in this case about what the rules said), and asks for a decision based only on the law applied to undisputed facts. Had the library not moved for a summary judgment, the court might have had before it information about how Kreimer supposedly had followed women and children into the stacks, about how he had stared at both female library staff and female library users, about his extremely offensive body odor, and about other types of behavior. Since such information was not legitimately before the court, the judge could only rule on the constitutionality of the library's policy. After review, he held that the policy could be applied in a discriminatory manner, based upon the whim of individual staff members, and declared it unconstitutional for reasons of vagueness and overbreadth. The court did uphold the right of libraries to make reasonable, specific, and necessary rules which would preserve the library as a place for quiet contemplation and study, but at the same time strongly upheld the First Amendment right to receive information in a publicly funded institution.

The Morristown library appealed all points of the judge's decision, including the court's holding that libraries are public forums and that there is an established First Amendment right to receive information. Subsequently, the Freedom to Read Foundation filed an amicus curiae brief, focused on those two points. The Foundation's brief laid out for the first time a newly formulated analysis of public libraries as public forums for ***access*** to information. Separating the public library from traditional public fora, such as parks or streets, which have always served as places for the ***dissemination*** of information (e.g., soapbox speeches and loud demonstrations), the Foundation's brief identified the public library as a traditional public forum for ***access*** to information. The brief argued that libraries have the right and responsibility to make rules governing patron behavior, but that, as a public forum for access to information, a library must meet the legal standards of reasonable time, place, and manner regulations (for example, preserving order in the library so that all may exercise their right of access). The brief also stressed the necessity for the library to make rules governing non-speech behavior.

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The second crucial point argued in the Freedom to Read Foundation's brief is that there is a well established First Amendment right to receive information, essential to the preservation of First Amendment rights as a whole. Obviously, the right of a speaker to speak cannot be fully realized if there is not a corresponding right on behalf of the listener to hear what is spoken.

In addition to the legal actions carried out under the auspices of the Freedom to Read Foundation, the American Library Association has established a Task Force on Preparation of Guidelines Regarding Patron Behavior and Library Usage. The task force — composed of Intellectual Freedom Committee members as well as representatives from the Public Library Association, the ALA Office for Library Outreach Services, the New Jersey Library Association, and the New Jersey State Library — plans to have a draft set of guidelines available by the 1992 Midwinter Meeting in San Antonio. At Midwinter, the task force will hold an open hearing on these draft guidelines in order to insure that they have broad applicability and are capable of dealing realistically with the problems that librarians all over the United States are facing.

Well, there you have it — some of the real and potential challenges to First Amendment freedoms. There are a multitude of others — some which directly affect libraries, such as fees for library service, and others which only indirectly affect libraries, such as debates over the Establishment Clause, as well as the continuing attempts to consolidate control of communications media into fewer and fewer hands. Seeds for a multitude of challenges have been planted; some are already bearing fruit. The others will do so eventually. In the end, all will affect the ability of libraries and librarians to uphold intellectual freedom principles, to continue to make available and accessible ideas and information across the spectrum of social and political thought. In a nutshell, our lives will become more difficult before they become easier. We're going to be tested — as perhaps never before. Librarians will be up to the task — because if we are not, there will no longer be a First Amendment institution where all ideas and information are available and accessible to anyone who needs them or wants them. And if we fail, our society, as we know it, will cease to exist. We cannot — we must not — we will not — fail.